[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 435

SANTOS MIGUEL, PETITIONER,

vs.

J. RAYMOND McCARL, COMPTROLLER GENERAL OF THE UNITED STATES, AND FREDERICK W. COLEMAN, CHIEF OF FINANCE, UNITED STATES ARMY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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IN SUPREME COURT OF THE DISTRICT OF COLUMBIA, HOLDING AN EQUITY COURT

Equity No. 54276

SANTOS MIGUEL, Plaintiff,

vs.

J. RAYMOND MCCARL, Comptroller General of the United States, and Frederick W. Coleman, Chief of Finance, U. S. Army, Defendants

BILL OF COMPLAINT FOR INJUNCTION—Filed April 27, 1932

The plaintiff, Santos Miguel, respectfully represents to the court:

1. That he is a citizen of the Philippine Islands, a national of the United States, and resides in the Philippine Islands.

The defendant, J. Raymond McCarl, is Comptroller General of the United States, and resides in the District of Columbia.

The defendant, Frederick W. Coleman, is Chief of Finance, United States Army, and resides in the District of Columbia.

2. The plaintiff enlisted in the Army of the United States October 1, 1901; and from said date served continuously as an enlisted man in the Philippine Scouts, which organization is a component part of the Army, until October 31, 1931, on which date he, having duly made application to the President, was, by direction of the President, placed upon the retired list with the rank of master sergeant, after 30 years' service, pursuant to paragraph 35, Special Orders No. 207, of the War Department dated September 3, 1931, reading as follows:

"35. Master Sergeant Santos Miguel, R-320883, Service Company, 45th Infantry (PS), will be placed on the retired [fol. 2] list at Fort William McKinley, P. I., effective October 31, 1931, and will be sent to his home. The travel di-

rected is necessary in the military service. QM 1600 A 211-2. (A. G. 220.85.) (4-3-21.)

"By order of the Secretary of War.

"Douglas MacArthur, General, Chief of Staff."

The application made by the plaintiff to the President to be placed upon the retired list, and the order of the Secretary of War acting for the President placing plaintiff upon the retired list, were under and by virtue of the authority contained in the act of March 2, 1907 (34 Stat. 1217), providing—

"That when an enlisted man shall have served 30 years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, and that said allowances shall be as follows: * * *."

3. Section 36 of the act of February 2, 1901 (31 Stat. 757), authorizing the organization of the Philippine Scouts, provided, inter alia, that—

"The pay, rations, and clothing allowances to be authorized for the enlisted men shall be fixed by the Secretary of War, and shall not exceed those authorized for the Regular Army."

The above quoted provisions of the act of February 2, 1901, were amended by the act of May 10, 1926, to read as follows:

"The pay and allowances of whatever nature and kind to be authorized for the enlisted men of the Philippine Scouts shall be fixed by the Secretary of War and shall not exceed or be of other classes than those now or which may hereafter be authorized by law for enlisted men of the Regular Army * * *."

4. That pursuant to the authority contained in the act above quoted the Secretary of War fixed the retired pay and allowances of enlisted men of the Philippine Scouts, and prescribed the same in Paragraph II, Circular No. 41, dated War Department, September 21, 1931, as follows:

"II—Retired Pay and Allowances of Philippine Scouts.—Under the provisions of the act of February 2,

1901, as amended by the act of May 10, 1926 (44 Stat. 406), the retired pay and allowances of members of the Philippine Scouts are fixed as follows:

1. Pay.—Seventy-five per cent (75%) of the base pay and the longevity pay received by them on the active list at the time of their retirement.

2. Allowances.—

a. Six dollars and thirty-five cents ($6.35) per month in lieu of rations and clothing, and

b. Four dollars and fifteen cents ($4.15) per month in lieu of quarters, heat, and light,
(A. G. 220.85) (4-3-31.)''

5. Subsequent to his retirement as aforesaid plaintiff duly submitted to his disbursing officer, Major S. R. Beard, Finance Department, U. S. Army, for payment by him, a voucher for the retired pay and allowances due plaintiff for the month of November, 1931, computed on the basis fixed in Paragraph II of War Department Circular No. 41, [fol. 3] above-quoted, amounting to $50.81, which voucher consisted of the following items, to-wit:

Pay (75% of active pay)	$40.31
Rations and clothing	6.35
Quarters	4.15
Total	50.81

6. The said disbursing officer, instead of paying said voucher for plaintiff's retired pay and allowances, presumed and proceeded to transmit the said voucher, through the Office of the Chief of Finance, United States Army, to the defendant, J. Raymond McCarl, Comptroller General of the United States, for an advance decision of the Comptroller General as to the legal authority for its payment. Acting upon said request the defendant J. Raymond McCarl, Comptroller General of the United States, on, to-wit, January 10, 1932, addressed a communication to plaintiff's disbursing officer in which he, the defendant J. Raymond McCarl, pretending to act within the functions of his office as Comptroller General and with the purpose, notwithstanding the aforesaid action of the President of the United States and the Secretary of War, of depriving plaintiff of

his rightful military status as a retired enlisted man of the Army as aforesaid, held, and stated in said communication to the said disbursing officer, that "the retirement of enlisted men of the Philippine Scouts is not authorized even by the remotest implication of the laws," and in said communication stated and ruled to said disbursing officer that "You are not authorized to pay the voucher which will be retained in the files of this office," the voucher referred to being the voucher for plaintiff's pay and allowances as a retired enlisted man hereinbefore described. By reason of said "advance decision" or ruling by the defendant, J. Raymond McCarl, the said disbursing officer knowing that his accounts would not be settled and approved and that he would be embarrassed in the settlement of his accounts should he disregard the said letter, thereupon, being thus coerced by the defendant, J. Raymond McCarl, declined to make said payment to plaintiff of his pay and allowances to which he was and is by law entitled as a retired enlisted man of the United States Army, and the defendant, Frederick W. Coleman, Chief of Finance, U. S. Army, with like knowledge of the embarrassment to, and coercion of, the said disbursing officer or any other disbursing officer of the Army, should any such officer disregard the said advance decision of the defendant, J. Raymond McCarl, and the defendant, Frederick W. Coleman being himself thus coerced by said decision, has also declined to order payment to plaintiff of his said pay and allowances as a retired enlisted man of the Army.

7. The plaintiff avers that Congress has appropriated funds for the payment of the pay and allowances of retired enlisted men of the Army and that said funds are now available for payment and will be paid to plaintiff when the unlawful interference of the defendant, J. Raymond McCarl, ceases; that he has served honestly and faithfully for thirty years in the Army under the officers of the Army of the United States and that he has at all times been advised and he has believed that upon completion of the requisite thirty years' service he would be entitled to retirement [fol. 4] under the statute; that, although he was placed upon the retired list by the President with the prescribed pay and allowances as aforesaid, he is, by reason of the aforesaid unlawful interference of the defendant, J. Raymond McCarl, deprived at his advanced age of his military

status as a retired enlisted man of the United States Army and of all retired pay and allowances; that he is advised and believes, and therefore avers, that a considerable number of enlisted men of the Philippine Scouts have completed, or are about to complete, the thirty years' service in the Army requisite to retirement and are, or soon will be, in a situation similar to his, and that the said unlawful interference of defendant, J. Raymond McCarl, has resulted and is resulting in irreparable injury to the plaintiff and so affects the important component of the Army to which plaintiff belongs as to do injury to the morale of said component of the Army and to embarass military administration.

8. Plaintiff is advised and believes, and therefore avers, that the defendant J. Raymond McCarl, Comptroller General of the United States, is without authority to question or determine the legality of the retirement of plaintiff as an enlisted man of the Philippine Scouts, or to annul the action of the Secretary of War taken for the Chief Executive and Commander in Chief of the Army in so retiring him and fixing the pay and allowances to which he is entitled; that, the Secretary of War, acting within the scope of his lawful authority, having retired plaintiff and having fixed the retired pay and allowances to which he is entitled, plaintiff, upon his retirement as hereinbefore set out, became and now is entitled to receive and to continue to receive the retired pay and allowances as they are now or may hereafter be fixed; that it is the duty of the defendant, Frederck W. Coleman, Chief of Finance, U. S. Army, to pay or to cause to be paid to plaintiff his retired pay and allowances as a retired enlisted man of the Philippine Scouts for the month of November, 1931, and subsequent months and to continue to pay or cause to be paid to him his retired pay and allowances as and when the same become due and payable, notwithstanding the aforesaid decision or ruling by the defendant, J. Raymond McCarl, Comptroller General of the United States; and that the failure, omission, and refusal to pay him such retired pay and allowances is an unlawful invasion of the rights of the plaintiff resulting in irreparable injury to him against which he has no adequate and complete remedy save and except in a court of equity.

Wherefore, the premises considered, the plaintiff prays as follows:

1. That the process of this court issue to the defendants requiring them to appear and answer this bill.

2. That the defendant, J. Raymond McCarl, Comptroller General of the United States, be restrained and enjoined pendente lite and permanently upon the final hearing of this cause from and against any and all interference with the defendant, Frederick W. Coleman, Chief of Finance, U. S. Army, or with any finance or disbursing officer of the United States Army, to prevent the payment to plaintiff of the retired pay and allowances due him for the month of November, 1931, and for subsequent months, and that shall accrue to his credit hereafter; and that said defend- [fol. 5] ant be enjoined and commanded to return forthwith to plaintiff's disbursing officer the voucher for his retired pay and allowances for the month of November, 1931, which voucher is now being retained in the files of the office of said defendant.

3. That the defendant, Frederick W. Coleman, Chief of Finance, U. S. Army, be enjoined and commanded to pay or cause to be paid to plaintiff the retired pay and allowances due him for the month of November, 1931, and subsequent months, and to continue to pay or cause to be paid to him his retired pay and allowances in the manner in which and at the times when such pay and allowances are ordinarily paid to retired enlisted men. And for such other, further or different relief as to the court may seem just and proper.

Santos Miguel, Plaintiff, by George M. Wilmeth, Attorney for Plaintiff. Samuel T. Ansell, Burr Tracy Ansell, George M. Wilmeth, Counsel for Plaintiff.

Duly sworn to by George M. Wilmeth. Jurat omitted in printing.

In Supreme Court of District of Columbia

Rule to Show Cause—Filed April 27, 1932

* * * * * * *

Upon consideration of the bill for injunction filed herein on the 27th day of April, 1932, it is by the court this 27th day of April, 1932,

Ordered, that the defendants, J. Raymond McCarl, Comptroller General of the United States, and Frederick W. Coleman, Chief of Finance, United States Army, appear in this court on the 4th day of May, 1932, at the hour of ten o'clock, a. m., and show cause, if any they may have, why they should not be enjoined and commanded pendente lite as prayed in said bill.

Provided, that a copy of this rule be served upon said defendants at least two clear days before the return day herein above fixed.

By the Court: Jesse C. Adkins, Justice.

[fol. 6] MARSHAL'S RETURN

Served a copy of the within rule on J. Raymond McCarl, Comptroller General of United States, by serving Reed F. Martin chief clerk 4-28-32 personally.

Edgar C. Snyder, U. S. Marshal in and for the Dist. of Columbia, by James S. McCarthy, Deputy U. S. Marshal. B.

Served a copy of the within rule on Frederick W. Coleman, Chief of Finance, U. S. Army, 4-28-32 personally.

Edgar C. Snyder, U. S. Marshal in and for the Dist. of Columbia, by C. G. Cowley, Deputy U. S. Marshal. B.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

MOTION OF J. RAYMOND MCCARL TO DISMISS BILL OF COMPLAINT, &C.—Filed May 4, 1932

* * * * * * *

Now comes the defendant, J. Raymond McCarl, Comptroller General of the United States, by his attorneys, and moves the court to dismiss the bill of complaint filed herein and for grounds thereof states as follows:

1. The bill of complaint is without equity.

2. The bill of complaint shows on its face that the proceeding is one to recover salary, pay, or emoluments as a retired officer or enlisted man of the Philippine Scouts, which salary, pay, or emoluments as claimed, the defendant, Comptroller General of the United States, has held in a

formal decision rendered on application made under paragraph 3 of section 8 of the act of July 31, 1894, 28 Stat. 207, as amended (U. S. C. 31:74), is not authorized by law to be paid to the plaintiff, and, therefore, the proceeding is not a matter entitling the plaintiff to injunctive relief.

3. The bill of complaint shows on its face that the proceeding is in reality one against the United States by the plaintiff for salary, pay, or emoluments alleged to be due him as a retired officer or enlisted man, and the bill of complaint entirely fails to show on its face that there has been obtained the consent of the United States to be sued for such salary, pay, or emoluments in injunction proceedings against its duly constituted officers.

4. To grant the writ of injunctive relief prayed for herein would have the effect of enforcing a claim against the United States without the United States being a party to the proceeding and without its consent.

5. The bill of complaint shows on its face that the plaintiff has a plain, adequate, and complete remedy at law by suit in the United States Court of Claims, under section 1, act of March 3, 1887, 24 Stat. 505, as amended by section 145, act of March 3, 1911, 36 Stat. 1136 (U. S. C. 28:250).

[fol. 7] 6. The identical claim of the plaintiff now is pending before the Court of Claims under departmental reference No. 169, having been referred to that court by letter dated February 15, 1932, of the Secretary of War, requesting a review by that court of a decision rendered by the Comptroller General, January 19, 1932, on the merits of the plaintiff's claim.

7. The bill of complaint shows on its face that it has for its object the establishment of a legal right against the United States by compelling the defendant, Comptroller General of the United States, to exercise his judgment and discretion respecting his official duties in the particular way desired by the plaintiff.

8. The facts stated in the bill of complaint, if true, present no matter entitling the plaintiff to relief by injunction.

Leo A. Rover, United States Attorney; John W. Fihelly, Assistant United States Attorney; R. L. Golze, General Counsel; Harrell O. Hoagland, Principal Attorney, Attorneys for the Defendant.

MEMORANDUM

May 4, 1932.—Notice of above motion, and acknowledgment of service, filed.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

MOTION OF FREDERICK W. COLEMAN TO DISMISS BILL OF COMPLAINT, &c.—Filed May 13, 1932

* * * * * * * *

Now comes the defendant, Frederick W. Coleman, Chief of Finance, United States Army, by his attorney, Leo A. Rover, United States Attorney in and for the District of Columbia, and moves the court to dismiss the bill of complaint filed herein, and for grounds thereof states as follows:

1. The bill of complaint is without equity.

2. The bill of complaint shows on its face that the proceeding is one to recover salary, pay, or emoluments as a retired officer or enlisted man of the Philippine Scouts, which salary, pay, or emoluments as claimed, the defendant, Comptroller General of the United States, has held in a formal decision rendered on application made under paragraph 3 of section 8 of the act of July 31, 1894, 28 Stat. 207, as amended (U. S. C. 31:74), is not authorized by law to be paid to the plaintiff, and, therefore, the proceeding is not a matter entitling the plaintiff to injunctive relief.

3. The bill of complaint shows on its face that the proceeding is in reality one against the United States by the plaintiff for salary, pay, or emoluments alleged to be due him as a retired officer or enlisted man, and the bill of complaint entirely fails to show on its face that there has been [fol. 8] obtained the consent of the United States to be sued for such salary, pay, or emoluments in injunction proceedings against its duly constituted officers.

4. To grant the writ of injunctive relief prayed for herein would have the effect of enforcing a claim against the United States without the United States being a party to the proceeding and without its consent.

5. The bill of complaint shows on its face that the plaintiff has a plain, adequate, and complete remedy at law by suit in the United States Court of Claims, under Section 1, act of March 3, 1887, 24 Stat. 505, as amended by section 145, act of March 3, 1911, 36 Stat. 1136 (U. S. C. 28:250).

6. The identical claim of the plaintiff now is pending before the Court of Claims under departmental reference No. 169 (having been referred to that court by letter dated February 15, 1932, of the Secretary of War, requesting a review by that court of a decision rendered by the Comptroller General, January 19, 1932, on the merits of the plaintiff's claim.

7. The facts stated in the bill of complaint, if true, present no matter entitling the plaintiff to relief by injunction.

Leo A. Rover, United States Attorney; John W. Fihelly, Assistant United States Attorney.

MEMORANDUM

May 13, 1932.—Notice of above motion, and acknowledgment of service, filed.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

MEMORANDUM OPINION—Filed June 10, 1932

* * * * * * *

Plaintiff, after serving thirty years in the Philippine Scouts, was by order of the President placed upon the retired list of the Army with the rank of master sergeant. Upon the request of the proper disbursing officer for decision whether he was authorized to make payment to plaintiff of his retired pay the Comptroller General ruled that enlisted men in the Philippine Scouts were not eligible to retirement and therefore that the disbursing officer was not entitled to make payment to him.

Thereupon this bill was filed to compel the Chief of Finance of the Army to make such payments and to restrain the Comptroller General from interfering with such action.

Each defendant has filed a motion to dismiss the bill and to discharge the rule issued thereon.

The case has been unusually well presented both in the oral argument and in very thorough and interesting briefs filed by counsel of record and by Col. W. A. Graham and Major Archibald King, of the Judge Advocate General's department of the Army.

The case arises out of a very serious difference of opinion between the Comptroller General and the War Department, [fol. 9] and the briefs discuss the powers of each branch of the Government. Because of the importance of the question and of the thorough way in which it has been presented I wish I could discuss the law in detail and give at length my reasons, but I have not time to do this. I do not think it necessary to decide all the questions raised by counsel.

I conclude that the motions to dismiss must be overruled for the following reasons:

1. In my judgment the Philippine Scouts are and since their organization have been part of the Army of the United States. Enlisted men and noncommissioned officers of the Scouts are entitled to retirement after thirty years' continuous service.

If plaintiff is eligible to retirement it is admitted that he performed the necessary service and that by appropriate order of October 31, 1931, he was retired.

Having found that the law authorized retirement I do not think the court is bound by the decision of the Comptroller General to the contrary.

2. The next question is that of appropriation.

The bill alleges on page 5 the existence of the appropriation with which to pay plaintiff. It may be contended that the motion to dismiss admits this averment. In their supplemental brief counsel for the Comptroller General argued that the appropriation does not exist, and this question has been discussed by Col. Graham and Major King. Again I think this is a question of law upon which the court is not bound by the Comptroller General. The appropriation is "for the pay of retired enlisted men." Having held that plaintiff is a retired enlisted man I conclude that he comes within this language.

3. It may be that plaintiff has a remedy in the Court of Claims. But having held that he is legally retired and that there is money available to pay him, I think the duty of pay-

ment is a ministerial one, and that this court has authority to compel the performance of that duty.

June 10, 1932.

Jesse C. Adkins, Justice.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ANSWER OF J. RAYMOND MCCARL TO RULE AND BILL—Filed June 16, 1932

* * * * * * *

Comes now the defendant, J. Raymond McCarl, as Comptroller General of the United States, now and at all times saving and reserving unto himself the benefits of all objections and exceptions to the errors and insufficiencies of the bill of complaint filed herein, and reserving unto himself all benefits of the lack of jurisdiction of the court appearing upon the face of said bill to grant the relief prayed for, and the lack of jurisdiction of the court to enjoin or restrain him as Comptroller General of the United States in the performance of the discretionary duties conferred and enjoined upon him officially by the statutory laws of the United States, and relying upon the same for answer to so much of the said bill of complaint as he is advised is material for him to answer, says as follows:

[fol. 10] 1. He admits that he is a citizen of the United States, is Comptroller General of the United States, and resides in the District of Columbia for the purpose of performing his official duties as Comptroller General of the United States. He has no knowledge or information sufficient to form a belief respecting whether the plaintiff is a citizen of the Philippine Islands or a national of the United States and says, moreover, that such allegations are conclusions of law not required to be answered by this defendant. Although he admits the plaintiff has resided in the Philippine Islands during the period he has served as an enlisted man in the Philippine Scouts, he denies any inference or implication which might arise from the allegations in the bill of complaint that the plaintiff is a citizen of the United States. He says with respect to the allegations concerning the office and residence of the defendant,

Frederick W. Coleman, that they are for answer by that defendant.

2. He avers that the allegations contained in paragraph 2 of the bill of complaint that the plaintiff was placed upon the retired list of the Army under and by virtue of the authority contained in the act of March 2, 1907, the provisions of which act the court will notice judicially, constitute conclusions of law not required to be answered by this defendant; but if such is not the case, then this defendant denies such allegations. This defendant avers further he has no knowledge or information sufficient to form a belief with respect to the allegations contained in the bill that the plaintiff duly made application to the President for retirement on October 31, 1931, and was by direction of the President placed upon the retired list, and if such averments are material in the present proceeding proof thereof is demanded. He admits the issuance of the War Department Special Orders No. 207, dated September 3, 1931, in paragraph 35 of which the retirement of the plaintiff was announced as set forth (quoted) in the bill of complaint. He says that he is advised and believes that whether the plaintiff enlisted in the Army of the United States when he enlisted in the organization of the Philippine Scouts for service therein and whether that organization is, or was, a component part of the Army are conclusions of law which are neither required to be admitted or denied by this defendant, but that they are matters to be ascertained and decided upon an examination of the laws of the United States. He further avers that he has no personal knowledge or information respecting the service of the plaintiff but has been advised and believes, through a report dated December 9, 1931, subscribed by The Adjutant General of the Army, that the service of the plaintiff has been as follows:

"The records of this office show that Santos Miguel, R-320883, enlisted October 1, 1901, was discharged September 30, 1904, per ETS, a sgt., 17th Co., Philippine Scouts.

"Enlisted Oct. 1 1904, discharged Sept. 30, 1907, per ETS, 1st sgt., 17th Co., P. S.

"Enlisted Oct. 1, 1907, discharged Sept. 30, 1910, per ETS, battalion sergeant major, 6th Battalion, P. S.

"Enlisted October 1, 1910, discharged Sept. 30, 1913, per ETS, battalion sergeant major 6th Battalion, P. S.

[fol. 11] "Enlisted October 1, 1913, discharged Sept. 30, 1917, per ETS, battalion sergeant major, 6th Battalion, P. S.

"Enlisted October 1, 1917, discharged August 7, 1919, by reason of termination of the emergency, battalion sergeant major, Hq. Co., 1st Philippine Infantry (prov.).

"Enlisted August 8, 1919, discharged August 7, 1920, per ETS, staff sergeant, Hq. Co., 1st Philippine Infantry (prov.)

"Enlisted August 8, 1920, discharged August 7, 1923, per ETS, master sgt., Hq. Co., 45th Infantry (P. S.).

"Enlisted August 8, 1923, discharged August 7, 1926, per ETS, master sergt, Service Co., 45th Infantry (P. S.).

"Enlisted August 8, 1926, discharged August 7, 1929, per ETS, master sgt., Service Co., 45th Infantry (P. S.).

"Enlisted August 8, 1929, retired October 31, 1931, master sergeant, Service Company, 45th Infantry (P. S.)."

He has been advised and believes, also, that the enlistment contracts executed and sworn to by the plaintiff show that the plaintiff enlisted on October 1, 1901, for service in the 17th Company of Native Philippine Scouts, at which time he gave his age as 22 years; that he reenlisted for service in the Philippine Scout organization on October 1, 1904, at which time he gave his age as 25 years; that he again reenlisted on October 1, 1907, at which time he gave his age as 24 years and 11 months; that he again reenlisted on October 1, 1910, at which time he gave his age as 26 years and 11 months; that he reenlisted on October 1, 1913, at which time he gave his age as 29 years; and that he reenlisted October 1, 1917, at which time he gave his age as 33 years, and that thereafter in reenlisting in said Philippine Scout organization he gave his birth date as November 1, 1884.

3. He is advised and believes that the court will take judicial notice of the provisions of the statutory law set forth in paragraph 3 of the bill of complaint, and, therefore, that no further answer to the allegations of that paragraph are required of this defendant.

4. He is advised and believes that the allegations in paragraph 4 of the bill of complaint that the Secretary of War

fixed the retired pay and allowances of the enlisted men of the Philippine Scouts pursuant to the authority contained in the act of February 2, 1901, 31 Stat. 757, as amended by the act of May 10, 1926, is a conclusion of law which is not required to be answered by this defendant; but if this is not the case, then this defendant denies the said allegations and avers on the contrary that the cited statute does not authorize the Secretary of War to fix rates of retired pay and allowances for enlisted men of the Philippine Scouts but has to do solely with the pay and allowances of said Philippine Scouts while they are in active service as enlisted men of that organization. He admits that War Department Circular No. 41, Paragraph II, dated September 21, 1931, contains the matter set forth in paragraph 4 of the bill of complaint.

5. This defendant avers that he has no knowledge or information sufficient to form a belief as to whether the plaintiff submitted to his disbursing officer, Major S. R. Beard, for payment by him a voucher for the retired pay and allowances claimed to be due plaintiff for the month of No- [fol. 12] vember, 1931, but he admits that War Department voucher, Form No. 107, designated as "pay roll" made out for the month of November, 1931, and subscribed by Major Benj. L. Jacobson, Finance Department, U. S. Army, was submitted to this defendant (received December 18, 1931) by Major S. R. Beard, through the Chief of Finance, U. S. Army, whereon Major Beard and the Chief of Finance requested this defendant to render his decision as to whether payment of the said voucher was authorized, and that while the voucher was computed in the gross sum of $50.81 on the basis of the items set forth substantially as in paragraph 5 of the bill of complaint, a debit entry of $4.02 appears in the voucher submitted to this defendant, to cover an insurance premium of the plaintiff, and that the net amount of the voucher, therefore, which was claimed for direct payment to the plaintiff by the disbursing officer was only $46.79.

6. He denies the allegations of paragraph 6 of the bill of complaint, as stated in the bill, and the innuendoes arising therefrom, except as they are expressly admitted herein in the averments of this defendant, and says that the facts in that respect within the knowledge of this defendant are as follows and not otherwise, to wit:

A voucher subscribed by Major Benj. L. Jacobson, Finance Department, covering the plaintiff's claim for retired pay in the gross sum of $50.81, and in the net amount of $46.79, was transmitted by the disbursing officer before whom the voucher was pending for payment, Major S. R. Beard, bonded Army finance officer, headquarters Philippine Department, to this defendant through the Chief of Finance, on November 5, 1931, with a request for decision by this defendant as to whether payment on the voucher was authorized as follows:

"Subject: Retired Pay.

"To: Comptroller General of the United States, through Chief of Finance, Washington, D. C.

"1. The accompanying voucher covering retired pay of Master Sergeant Santos Miguel, R-320883, Service Company, 45th Infantry (P. S.), is forwarded with request for an advance decision as to the legal authority for payment.

"2. Reasonable doubt exists as to the authority of the Secretary of War, under the provisions of the act of February 2, 1901, as amended by act of May 10, 1926 (44 Stat. 496), to authorize retirement and fix the retired pay and allowances of enlisted men of the Philippine Scouts, as prescribed in Section II, Circular 41, War Department, dated September 21, 1931, copy herewith.

"3. The voucher referred to in paragraph 1 above was referred to the undersigned as disbursing officer, office of the finance officer, Philippine Department, Manila, for payment.

"(S.) S. R. Beard, Major, F. D., Disbursing Officer."

[fol. 13] This request from Major Beard for decision of this defendant was forwarded to this defendant from the War Department on December 16, 1931, by 1st Ind., which, in part, is as follows:

241.18-FAA (Miguel, Santos), #R-320883. 1st Ind.

War Department, Office Chief of Finance, Washington

December 16, 1931.

To the Comptroller General of the United States, Washington, D. C.:

"1. This request for advance decision is made under the authority contained in the act of July 31, 1894 (28 Stat.

208; U. S. C. 31:74): It is requested that such decision, when rendered, be forwarded to the disbursing officer, through this office."

This defendant thereupon gave full consideration to the voucher and statements presented in support of the request for his decision, and also carefully considered the statutes and their legislative history governing the pay of the Philippine Scout organization, and considered also the opinions which had been delivered in reference to the status of the Philippine Scouts by and under former Secretaries of War and by the Government accounting officers, and considered the status of the Philippine Islands as an unincorporated Territory of the United States and the status of the natives thereof, as well as the various appropriation acts which have made provision for pay and allowances of the Philippine Scouts, and he reached the conclusion that payment of retired pay and allowances to the plaintiff, on the voucher presented, under existing appropriations of the public moneys, was not authorized. He thereupon rendered his decision to Major Beard through the office of the Chief of Finance, Washington, D. C., as requested by Major Beard, the decision being dated January 19, 1932, published in 11 Comp. Gen. 275. A copy of the said decision is attached hereto as Exhibit A and is made a part hereof. The decision is self-explanatory and sufficiently recites certain of the doubts entertained by this defendant which led him to hold the payment of the voucher not authorized. The concluding paragraph thereof contains the decision of this defendant on the question presented by Major Beard as follows:

"You are not authorized to pay the voucher which will be retained in the files of this office."

This defendant avers that the application for the decision, and the Chief of Finance in his indorsement so recites, was made, and the decision was rendered, under paragraph 6 of section 8 of the act of July 31, 1894, 28 Stat. 207, as amended, which is set out in paragraph 3 of section 74, U. S. Code Supplement, as follows:

"Disbursing officers, or the head of any executive department, or other establishment not under any of the ex-

ecutive departments, may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement. * * *"

[fol. 14] This provision of law has been restated to show its particular application in the War Department and detailed regulations have been promulgated thereon in Army Regulations 35-730, dated May 20, 1930, as follows:

"2. Statutory provisions relative to decisions. a. Disbursing officers or the Secretary of War may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under him, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement. See sec. 8, act July 31, 1894 (28 Stat. 208; U. S. C. 31:74; sec. 1672, M. L. 1929).

"b. A disbursing officer in whose accounts the General Accounting Office makes a disallowance may, at any time within one year from the date of the disallowance, make request upon the Comptroller General for review of the action of the General Accounting Office in making the disallowance and revision thereof. See sec. 8, act July 31, 1894 (28 Stat. 207).

"3. Classification of decisions. a. The statutes cited above provide for two general classes of decisions to be rendered by the Comptroller General: (1) Decisions in advance of payment (commonly called advance decisions) upon any question involving a payment to be made, and (2) decisions in the nature of reviews of disallowances. The first class is requested and rendered before making payment and is a safeguard against disallowance. The second class is rendered, after the payment has been made and disallowed, in response to an effort to overcome the disallowance.

"b. There are also two other classes of decisions frequently rendered by the Comptroller General: (1) Reviews of the action of the General Accounting Office in disallowing claims submitted to that office for direct settlement (see par. 4c), and (2) decisions rendered by the Comptroller

General upon his own motion, relative to some question arising in connection with the work of his office.

"c. The procedure for requesting decisions of the classes mentioned in a and b above is prescribed in paragraph 4.

"4. Requests for decisions. As indicated in paragraph 2a, advance decisions may be requested by disbursing officers or the Secretary of War. There is no authority of law for request by any other officer of the Army or War Department for this class of decisions.

"a. Requests by the Secretary of War. Unless otherwise directed by the Secretary of War—

"(1) The chief of any arm, service, or bureau of the War Department who desires an advance decision by the Comptroller General upon any problem with which he is confronted in the administration of his duties, and as to which the Comptroller General is authorized by statute (par. 2) to render a decision, will transmit his request therefor to the Chief of Finance, either in the form of a letter addressed to him, or in the form of a draft of letter to the Comptroller General prepared for the signature of the Secretary of War.

"(2) The Chief of Finance, upon receipt of such request, will prepare it for action by the Secretary of War and will transmit same stating his concurrence, or other comment, to the Judge Advocate General for his concurrence or comment.

[fol. 15] "(3) If the Chief of Finance and the Judge Advocate General are in accord as to the proposed request for decision, it will be presented to the Secretary of War for signature. If they do not agree conference will be held between representatives of the two officers with a view to securing agreement, if possible. If agreement is not reached through such conference, the request for decision when presented to the Secretary of War for his action, will be accompanied by a statement by the dissenting officer of his reason for withholding concurrence. Requests pertaining to the procurement of military supplies will be routed through the office of the Assistant Secretary of War.

"(4) The procedure prescribed in (1), (2), and (3) above will not apply to requests originating in the office of either Assistant Secretary of War. Such requests will be pre-

pared and submitted in accordance with such procedure as may be prescribed by those officers.

"b. Requests by disbursing officers for advance decisions, and requests for review of disallowances by disbursing officers or by other officers having custody of disbursing officers' retained records, will be prepared and submitted as prescribed by the Chief of Finance.

"c. Any person serving in or with the Army, who has presented a claim to the General Accounting Office for direct settlement and has been advised of the disallowance of such claim by that office, or has been allowed a sum less than that to which he believes himself entitled may, at any time within one year after the date of such disallowance or decreased allowance, request review thereof by the Comptroller General."

This defendant avers that the official decision of this defendant on the plaintiff's claim did not undertake to set aside the administrative action of the War Department placing the plaintiff on the retired list, and had to do solely with the question of whether there was an existing appropriation of public money available for payment of retired pay and allowances to plaintiff because of such placing of the plaintiff on the retired list. This defendant avers further that his decision followed a practice which the Government accounting officers have followed without interruption, at least, since the act of March 30, 1868, 15 Stat. 54, to decide every question of law and of fact necessary to be decided in determining whether payment on a claim is authorized under existing appropriations, except only in those rare cases where the Congress has by specific language made the finding or decision of some other official conclusive on the question of whether payment is authorized. This defendant further avers that there was no coercion whatever involved by this defendant upon the Chief of Finance, U. S. Army, or the disbursing officer, Major Beard, but that the statute itself required this defendant to render his decision on the question presented, as this defendant should decide the law to be "without direction from any other officer." (Section 304, act of June 10, 1921, 42 Stat. 24, U. S. C. 31:44.) The statute under which the decision was required to be rendered itself declared in unequivocal terms what the effect of the decision shall be, namely, that it shall govern the General Accounting Office, under the direction

of this defendant, "in passing upon the account involved." [fol. 16] The statutory law of the United States also declares what the duty of this defendant shall be in case his decision is not followed and it becomes necessary to disallow credit in the disbursing account for a payment contrary to the decision. (Sections 3624 to 3633, Revised Statutes, as amended, U. S. Code 31:505 to 514.) This defendant also avers that the Chief of Finance, United States Army, does not function as a bonded disbursing officer and that no statute appears to vest that official with any authority and that he does not have authority to direct any bonded disbursing officer to make a payment which this defendant, in a formal decision rendered under the cited act of July 31, 1894, as amended, has held unauthorized under appropriations of public moneys.

7. He denies the allegations contained in paragraph 7 of the bill of complaint that any funds appropriated by the Congress for the pay and allowances of retired enlisted men of the Army are now available, or have been available, for payment of retired pay to the plaintiff. He says, moreover, that at the time the bill of complaint was filed there was a deficiency under "Pay of the Army" in the amount of approximately $1,900,000 and that the pay and allowances, even of the active forces of the United States Regular Army, necessarily would be suspended on or before June 30, 1932, for lack of an appropriation should the Congress fail to enact the pending second deficiency bill which contains an item of $1,900,000, or thereabouts, proposed to enable the War Department to meet the current pay rolls of personnel to the end of the present fiscal year; that is, to June 30, 1932. Whether or not the deficiency appropriation is made available, however, this defendant avers is immaterial to the question presented on the bill of complaint. For the decision by this defendant that no existing appropriations of public moneys are authorized to be used to pay the plaintiff retired pay is based upon this defendant's finding and conclusion that the Congress has never specifically provided any appropriation authorized to be used for payment of retired pay to enlisted men whose active service in the Philippine Scouts has been terminated, and that the War Department has never brought to the attenton of the Congress in any formal official manner that the retirement of enlisted natives of the Philippine Scouts either was contem-

plated or had been accomplished. This defendant denies that there has been any unlawful interference by this defendant, or on his behalf, with respect to the claim of the plaintiff for retired pay.

This defendant avers, also, that he has no knowledge or information sufficient to form a belief respecting the manner in which the plaintiff has served as an enlisted man in the Philippine Scouts, or as to what he has been advised or believed he would be entitled to upon completing thirty years' service in the Philippine Scouts. And this defendant avers further that he has no knowledge or information sufficient to form a belief respecting the number of enlisted men of the Philippine Scouts who have completed or are about to complete thirty years' service in that organization, or as to what effect it will have upon the morale of the organization of the Philippine Scouts that there is no appropriation for payment to the plaintiff upon his claim for retired pay and suggests that the effect, if any, is a question of policy for consideration by the Congress. If [fol. 17] any implications or inferences are intended to be drawn from the reiteration in the allegations of the bill respecting the service of the plaintiff in the "United States Army" that the plaintiff is entitled to the same benefits of retirement pay, allowances, etc., as enlisted men of the Regular Army, then the allegations to that effect are specifically denied by this defendant.

8. The allegations and conclusions set forth in paragraph 8 of the bill of complaint, as stated, in so far as they are material, are denied by this defendant; and this defendant avers that the respective official duties of this defendant as Comptroller General of the United States and of the Secretary of War are prescribed and defined by statutory laws of which this court will take judicial notice, and that whatever the effect of the action of the Secretary of War may be of having ordered the placing of the plaintiff on a retired list of the Army is a matter wholly separate and apart from the question of what effect that action may have to entitle the plaintiff to payment of retired pay out of appropriated moneys of the United States, which latter question the law has committed to the official discretion of this defendant to decide; and that as found and decided by defendant in performance of his statutory duties there is no appropriation available for payment of such retired pay,

the action of the Secretary of War can not withdraw for such a payment public moneys from the Treasury of the United States—article 1, section 9, paragraph 7, of the Constitution of the United States declaring that "No money shall be drawn from the Treasury but in consequence of appropriations made by law," and that the statutory duties placed upon defendant by the Congress have made the determination of the availability of an appropriation for a payment solely a question for decision by defendant.

Answering further, this defendant says that there has been no unlawful or improper failure, omission, or refusal to pay the plaintiff retired pay out of the appropriated moneys of the United States, and he denies that the plaintiff has suffered any irreparable injury or that he does not have an adequate and complete remedy under the Tucker Act by an action at law, and says, on the contrary, that the plaintiff has a plain, adequate, and complete remedy at law in the Court of Claims, which is the only remedy which the Congress has provided for the plaintiff or others in his situation who disagree with the decisions of this defendant respecting what uses may be made of the appropriated moneys of the United States. This defendant says, also, that the Secretary of War on February 15, 1932, claiming to be acting under section 148 of the Revised Statutes, transmitted to the Court of Claims a request that that court should review the decision of this defendant and should determine judicially what the legal rights of the defendant to retired pay may be, if any. That reference by the Secretary of War is now pending before the Court of Claims for decision and is docketed as Court of Claims departmental reference No. 169. Whether or not the Court of Claims has jurisdiction to pass upon the question in the form presented, it is certain that it has jurisdiction of the identical claim of the plaintiff in a direct action by him which he is now attempting to establish in this proceeding for an injunction.

This defendant says that the sole object of this proceeding is to establish a claim against the United States and to [fol. 18] have this court restrain this defendant from obeying a specific injunction of the law as to what effect this defendant shall give his own decisions, and that the issuance of such a writ as prayed would result in direct conflict with the law fixing this defendant's jurisdiction and would seriously interfere with the control of the Congress over the

public moneys, disrupt the functioning of the accounting system through the substitution of peremptory judicial writs for decisions of the Comptroller General, and, accordingly, this defendant having fully answered prays this honorable court to dismiss the bill of complaint for an injunction, to discharge the rule to show cause and that he may have his costs, assessed against the plaintiff.

J. R. McCarl, Comptroller General of the United States; Leo A. Rover, United States Attorney, D. C.; John W. Fihelly, C., Asst. United States Attorney, D. C.; R. L. Golze, General Counsel; Harrell O. Hoagland, Principal Attorney, Attorneys for the Defendant, Comptroller General of the United States.

Duly sworn to by J. Raymond McCarl. Jurat omitted in printing.

EXHIBIT "A" TO ANSWER

A-40048

Comptroller General of the United States, Washington

January 19, 1932.

Major S. R. Beard, F. D., U. S. Army, Office of Finance Officer, Headquarters, Philippine Department, Through Chief of Finance.

SIR: There has been received your letter of November 5, 1931, requesting decision whether you are authorized to make payment on a pay-roll voucher transmitted therewith in the sum of $50.81 representing retired pay and allowances of Santos Miguel, master sergeant, Philippine Scouts, retired, for the month of October (November), 1931, who is stated to have been placed on the retired list effective October 31, 1931, in accordance with paragraph 35, War Department Special Orders No. 207, of September 3, 1931.

[fol. 19] A statement of the soldier's service shows that he first enlisted in the Philippine Scouts October 1, 1901, serving continuously therein until October 31, 1931, when he was retired pursuant to paragraph 35 of War Department Spe-

cial Orders No. 207, dated September 3, 1931. The retirement benefits which it is proposed to allow are based partly on the provisions of the act of March 2, 1907, 34 Stat. 1217, and partly under the authority vested in the Secretary of War under the provisions of section 36 of the act of February 2, 1901, 31 Stat. 757, as amended by the act of May 10, 1926, 44 Stat. 496. That is to say, the voucher computes the retired "pay" at three-fourths of $53.75, the pay he was receiving on October 31, 1931, as a master sergeant, Philippine Scouts ($40.31), plus $10.50, representing two-thirds of the allowance authorized by the act of March 2, 1907, to be paid to enlisted men of the Army, Navy, or Marine Corps, who have been retired after thirty years' service under section 2, War Department Circular No. 41, dated September 21, 1931.

Section 36 of the act of February 2, 1901, 31 Stat. 757, provides:

"That when in his opinion the conditions in the Philippine Islands justify such action the President is authorized to enlist natives of those islands for service in the Army, to be organized as scouts, with such officers as he shall deem necessary for their proper control, or as troops or companies, as authorized by this act, for the Regular Army. The President is further authorized, in his discretion, to form companies, organized as are companies of the Regular Army, in squadrons or battalions, with officers and noncommissioned officers corresponding to similar organizations in the cavalry and infantry arms. The total number of enlisted men in said native organizations shall not exceed twelve thousand, and the total enlisted force of the line of the Army, together with such native force, shall not exceed at any one time one hundred thousand.

"The majors to command the squadrons and battalions shall be selected by the President from captains of the line of the Regular Army, and while so serving they shall have the rank, pay, and allowances of the grade of major. The captains of the troops or companies shall be selected by the President from first lieutenants of the line of the Regular Army, and while so serving they shall have the rank, pay, and allowances of captain of the arm to which assigned. The squadrons and battalion staff officers and first and sec-

ond lieutenants of companies may selected from the non-commissioned officers or enlisted n of the Regular Army of not less than two years' servic , or from officers or non-commissioned officers or enlisted men serving, or who have served, in the volunteers subsequent to April twenty-first, eighteen hundred and ninety-eight, and officers of those grades shall be given provisional appointments for periods of four years each, and no such appointments shall be continued for a second or subsequent term unless the officer's conduct shall have been satisfactory in every respect. The pay and allowances of provisional officers of native organizations shall be those authorized for officers of like grades in the Regular Army. The pay, rations, and clothing allowances to be authorized for the enlisted men *men* shall be fixed by the Secretary of War, and shall not exceed those authorized for the Regular Army.

[fol. 20] "When, in the opinion of the President, natives of the Philippine Islands shall, by their services and character, show fitness for command, the President is authorized to make provisional appointments to the grades of second and first lieutenants from such natives, who, when so appointed, shall have the pay and allowances to be fixed by the Secretary of War, not exceeding those of corresponding grades of the Regular Army."

Section 22 of the national defense act of June 3, 1916, 39 Stat. 181, provides that all existing laws pertaining to the Philippine Scouts shall continue and remain in force, except as therein specifically provided otherwise. Section 26 provides:

"Retirement of Officers of Philippine Scouts.—Captains and lieutenants of Philippine Scouts who are citizens of the United States shall hereafter be entitled to retirement under the laws governing the retirement of enlisted men of the Regular Army, except that they shall be retired in the grade held by them at the date of retirement, shall be entitled to retirement for disability under the same conditions as officers of the Regular Army, and that they shall receive, as retired pay, the amounts allowed by law, as retired pay and allowances, of master signal electricians of the United States Army, and no more: Provided, That double time for service beyond the continental limits of the United States

shall not be counted for the purposes of this section so as to reduce the actual period of service below twenty years: Provided further, That former officers of the Philippine Scouts who, because of disability occasioned by wounds received in action, have resigned or been discharged from the service, or who have heretofore served as such for a period of more than five years and have been retired as enlisted men, shall be placed upon the retired list as officers of Philippine Scouts and thereafter receive the retired pay and allowances provided by this section for other officers of Philippine Scouts: And provided further, That any former officer of Philippine Scouts who vacated his office in the Philippine Scouts by discharge or resignation on account of disability contracted in the line of duty and who was subsequently retired as an enlisted man, except any former officer of Philippine Scouts who has been retired as an enlisted man by special Act of Congress, shall be transferred to the retired list created by this section and shall thereafter receive the retired pay and allowances authorized by this section, and no more. Officers of Philippine Scouts retired under the provisions of this section shall not form part of the limited retired list now authorized by law."

Said section 26 was repealed by the act of June 4, 1920, 41 Stat. 775, and in lieu thereof there was added section 22 (a), 41 Stat. 770, which provided that:

"The President is authorized to form the Philippine Scouts into such branches and tactical units as he may deem expedient, within the limit of strength prescribed by law, organized similarly to those of the Regular Army, the officers to be detailed from those authorized in section 4 hereof. On July 1, 1920, all officers of the Philippine Scouts on the active list, who are citizens of the United States and are found qualified under such regulations as the President may prescribe, shall be recommissioned in some one of the branches provided for by this Act, and those not so recom- [fol. 21] missioned shall continue to serve under their commissions as officers of the Philippine Scouts. No further appointments shall be made as officers of Philippine Scouts except of citizens of the Philippine Islands, who may be appointed in the grade of second lieutenant, under such regulations as the President may prescribe. Officers com-

missioned in the Philippine Scouts shall be subject to promotion, classification, and elimination, as hereinafter prescribed for officers of the Regular Army. Those now on the retired list shall hereafter receive the same pay as a retired second lieutenant of equal service. Officers of the Philippine Scouts shall hereafter be retired under the same conditions, and those hereafter placed on the retired list shall receive the same retired pay, as other officers of like grades and length of service, and shall be equally eligible for advancement on account of active duty performed since retirement. *Nothing in this Act shall be construed to alter in any respect the present status of enlisted men of the Philippine Scouts.*" [*Underscoring* supplied.]

Section 17 of the act of June 10, 1922, 42 Stat. 632, provides that officers and former officers of the Philippine Scouts, who were placed on the retired list prior to June 4, 1920, shall be entitled to promotion on the retired list for active duty performed subsequent to retirement in accordance with section 127 (a) of the act of June 3, 1916, as amended, and to the same pay and benefits received by other officers of the Army of like grade and length of service on the retired list, and section 21 thereof provided:

"That nothing in this Act shall operate to change in any way existing laws, or regulations made in pursuance of law governing pay and allowances of * * * the enlisted men of the Philippine Scouts * * *."

The act of March 2, 1907, 34 Stat. 1217, providing for the retirement of noncommissioned officers, petty officers, and enlisted men of the Army, Navy, and Marine Corps of the United States is worded as follows:

"That when an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, and that said allowances shall be as follows: Nine dollars and fifty cents per month in lieu of rations and clothing and six dollars and twenty-five cents per month in lieu of quarters, fuel, and light: Provided, That in computing the necessary thirty years' time all service in the Army, Navy, and Marine Corps shall be credited."

It seems clear from this legislative history that in authorizing the enlistment in the Army of natives of the Philippine Islands to be organized as scouts and when deemed necessary "as troops or companies as authorized * * * for the Regular Army" that it was not contemplated that any member of such organization of natives of the Philippine Islands should be entitled to retirement, either officers or enlisted men. By section 22 of the act of June 3, 1916, provision was made for placing on the retired list captains and lieutenants of the Philippine Scouts citizens of the United States under the laws governing the retirement of enlisted men of the Regular Army. This provision for the retirement of officers of the Philippine Scouts [fol. 22] has been changed by subsequent legislation, but it has been specifically provided that nothing therein should alter in any respect the present status of enlisted men of the Philippine Scouts. No law has modified the status of enlisted men of the Philippine Scouts as fixed by the act of 1901. The inapplicability of the laws relating to the retirement of enlisted men of the Regular Army to the Philippine Scouts is made apparent by section 26 of the act of June 3, 1916, in restricting the counting of double time by the officers of the Philippine Scouts therein authorized to be retired as enlisted men of the Regular Army, and this inapplicability is further apparent in the act of 1907 providing for the retirement of enlisted men of the Regular Army which fixes the commuted value for rations, clothing, quarters, fuel, and light in excess of the pay paid enlisted men of the Philippine Scouts in the lower grades. There is for noting, also, that this is a military organization composed of natives of a Territory under the sovereignty of the United States organized primarily for duty in that Territory and that it is the declared purpose of the United States "to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable government can be established therein." Act of August 29, 1916, 39 Stat. 545. It is to be observed that in the retirement of these natives of the Philippine Islands the American taxpayer is being asked, in addition to supporting a native force in the Philippne Islands for the maintenance of order there for the benefit of the inhabitants of those Islands, to also support enlisted members of that force for the remainder of their lives at a sub-

stantial retired pay after they were afforded such employment for 30 years. The retirement of enlisted men of the Philippine Scouts is not authorized even by the remotest implication of the laws.

You are not authorized to pay the voucher which will be retained in the files of this office.

Respectfully, (Signed) J. R. McCarl, Comptroller General of the United States.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ANSWER OF FREDERICK W. COLEMAN—Filed June 17, 1932

* * * * * * *

1. This defendant, on information and belief, admits the allegations of paragraph 1 of the bill of complaint concerning plaintiff, Santos Miguel, and defendant J. Raymond McCarl. This defendant admits the allegations of paragraph 1 concerning himself.

2. This defendant, on information and belief, admits the facts alleged in paragraph 2 of the bill.

3. This defendant admits the existence of the statutes quoted in paragraph 3 of the bill.

4. This defendant admits the allegations of fact in paragraph 4 of the bill.

5. This defendant, on information and belief, admits the allegations of paragraph 5 of the bill.

[fol. 23] 6. This defendant admits that the disbursing officer mentioned in the bill, Major S. R. Beard, Finance Department, U. S. Army, transmitted the voucher mentioned in the bill through the office of the Chief of Finance, U. S. Army, to defendant McCarl, Comptroller General of the United States, for an advance decision by him as to the legal authority for its payment, and that defendant McCarl rendered an advance decision as alleged. This defendant further admits that said disbursing officer, Major Beard, because of the above decision of defendant McCarl, has declined and still declines to pay plaintiff the sums represented by the voucher mentioned in the bill or any other sums as pay and allowances of a retired enlisted man. This defendant denies that he has declined to order pay-

ment to plaintiff of pay or allowances as a retired enlisted man of the Army, but admits that he has not ordered such payment, for the reason that he is advised and believes that if such payment should be ordered by him, the Comptroller General of the United States would not allow credit therefor.

7. This defendant admits that Congress has appropriated funds for payment of the pay and allowances of retired enlisted men of the Army and that such funds are now available for payment and would be paid to plaintiff if vouchers therefor would be passed by defendant McCarl. This defendant admits that plaintiff has served honestly and faithfully for thirty years as an enlisted man in the Army under officers of the Army. This defendant admits that plaintiff's pay and allowances as a retired enlisted man are withheld in consequence of the decision rendered and position taken by defendant McCarl as hereinbefore stated. This defendant, on information and belief, admits that there are a considerable number of enlisted men of Philippine Scouts who have completed, or are about to complete thirty years service in the Army, and that the decision rendered and position taken by defendant McCarl do and will injuriously affect the morale of a component part of the Army, to wit, the Philippine Scouts. As to other matters alleged by plaintiff in paragraph 7 of his bill, this defendant knows nothing.

8. Inasmuch as paragraph 8 of plaintiff's bill consists wholly of conclusions of law and contains no allegations of fact, this defendant respectfully prays to be excused from answering the same.

Wherefore, having fully answered plaintiff's bill of complaint, this defendant prays this honorable court that he be discharged with his costs.

Frederick W. Coleman, Chief of Finance, U. S. Army. Leo A. Rover, United States Attorney; John W. Fihelly, Assistant United States Attorney; W. A. Graham, Colonel, Judge Advocate General's Dept., U. S. Army; Archibald King, Major, Judge Advocate General's Dept., U. S. Army, Attorneys for Defendant, Frederick W. Coleman.

[fol. 24] *Duly sworn to by Frederick W. Coleman. Jurat omitted in printing.*

IN SUPREME COURT OF DISTRICT OF COLUMBIA

MOTION TO STRIKE DEFENDANTS' ANSWERS TO BILL OF COMPLAINT—Filed June 23, 1932

* * * * * * *

Now comes the plaintiff, by his attorneys, and moves the court to strike out the answers of the defendants to the bill of complaint herein filed, and to award plaintiff a decree pro confesso for the following reasons, to wit:

1. The answers are insufficient in law.

2. The answers do not raise any issue of fact.

3. Under the admitted facts the legal issues involved in this cause have been decided by this court. See memorandum filed herein June 10, 1932.

4. Under the admitted facts and the decision of this court, (a) the Philippine Scouts are and since their organization have been part of the Army of the United States, and enlisted men and noncommissioned officers of that organization are entitled to retirement after thirty years continuous service; (b) the plaintiff is a retired enlisted man of the Army; (c) Congress has appropriated funds, which are now available for the payment of his retired pay as such an enlisted man; and (d), having been legally retired and there being money available to pay him, the duty of payment is a ministerial one the performance of which duty this court has authority to compel.

5. Under the admitted facts the Comptroller General of the United States was and is without authority to interfere with the Chief of Finance, U. S. Army, to prevent the payment to plaintiff of the pay due him as a retired enlisted man.

6. Under the admitted facts it is the plain ministerial duty of the defendant, Frederick W. Coleman, Chief of Finance, U. S. Army, to pay or cause to be paid to plaintiff the pay due him as a retired enlisted man of the United States Army.

Samuel T. Ansell, Burr Tracy Ansell, George M. Wilmeth, Attorneys for Plaintiff.

Service of a copy of the foregoing and annexed motion accepted this 23rd day of June, 1932.

Walter M. Shea, Asst. U. S. Atty., of Counsel for Defendants.

[fol. 25] In Supreme Court of District of Columbia

Memorandum Opinion—Filed July 16, 1932

* * * * * * *

This matter comes on for hearing on plaintiff's motion to strike the answers of the defendants herein filed and to award plaintiff a decree pro confesso.

An examination of the answers filed by the defendant J. Raymond McCarl, Comptroller General of the United States, and of the defendant Frederick W. Coleman, Chief of Finance, U. S. Army, fails to disclose any issue of fact other than as raised by admitted facts. As to such issues, the law of the case was settled by Mr. Justice Adkins as shown by his memorandum filed herein on June 10, 1932.

It follows that plaintiff's motion here considered should be sustained. It is so ordered.

July 16, 1932.

F. D. Letts, Justice.

In Supreme Court of District of Columbia

Final Decree—Filed September 16, 1932

* * * * * * *

This cause coming on for hearing at this term, first upon separate motions by the respective defendants to dismiss the bill of complaint herein; and second, the defendants having answered, upon motion by the plaintiff to strike out the separate answers of the respective defendants to the said bill of complaint, and after considering the arguments of counsel for both sides, it is by the court this 16th day of September, 1932,

Adjudged, ordered, and decreed, that (1) the said motions by the respective defendants to dismiss the said bill of complaint be and the same are hereby overruled; and

(2) the said motion by the plaintiff to strike out the said answers of the respective defendants be and the same hereby is allowed; and, the respective defendants having failed to file other answers or defense to the said bill of complaint within the time required by the rules of the court, but having elected to stand on their respective motions to dismiss and on their answers as filed, and having stipulated that a final decree be taken at this time, it is further

Adjudged, ordered, and decreed, that (1) the defendant, J. Raymond McCarl, Comptroller General of the United States, be restrained and enjoined from and against any and all interference with the defendant, Frederick W. Coleman, Chief of Finance, United States Army, to prevent the payment to plaintiff of the retired pay and allowances due him for the month of November, 1931, and for subsequent months, and that shall accrue to his credit hereafter; and that said defendant be enjoined and commanded to return forthwith to plaintiff's disbursing officer the voucher for his retired pay and allowances for the month of November, 1931, which voucher is now being retained in the files of the office of said defendant, and (2) the defendant, [fol. 26] Frederick W. Coleman, Chief of Finance, United States Army, be and he is hereby enjoined and commanded to pay or cause to be paid to plaintiff the retired pay and allowances due him for the month of November, 1931, and subsequent months, and to continue to pay or cause to be paid to him his retired pay and allowances in the manner in which and at the times when such pay and allowances are ordinarily paid to retired enlisted men of the Army.

By the Court:

Jesse C. Adkins, Justice.

No objection as to form. The defendants consent to the entry of final decree herein in place of decree pro confesso.

John W. Fihelly, Assistant United States Attorney.

In Supreme Court of District of Columbia

Notation of Appeal—Filed October 5, 1932

* * * * * * *

From the final decree entered in the above entitled cause on September 16, 1932, the defendants, in open court and

in the presence of the attorney for the plaintiff, noted an appeal to the Court of Appeals of the District of Columbia, this 5" day of October, 1932.

Jesse C. Adkins, Justice.

MEMORANDUM

October 19, 1932.

Time within which to file assignment of errors and designation of record extended from day to day, to and including, November 21, 1932.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ASSIGNMENT OF ERRORS ON BEHALF OF J. RAYMOND MCCARL, AS COMPTROLLER GENERAL OF THE UNITED STATES—Filed November 19, 1932.

* * * * * * *

Now comes the defendant J. Raymond McCarl, as Comptroller General of the United States, by his attorneys, and assigns for errors that the court erred—

1. In overruling the motions of the respective defendants to dismiss the bill of complaint for an injunction and to discharge the rule to show cause.

2. In granting the plaintiff's motion to strike the answer of the defendant, Comptroller General of the United States, to the bill of complaint and to the rule to show cause.

3. In taking jurisdiction to pass upon and decide the question of plaintiff's right to retirement in this proceeding for an injunction.

4. In taking jurisdiction to decide the question of whether there is available an appropriation to make payment of retired pay to the plaintiff.

[fol. 27] 5. In holding that the plaintiff was authorized by the statutory laws of the United States to be placed on the retired enlisted men's list of the United States Army.

6. In holding that the plaintiff is entitled to be paid retired pay as a retired enlisted man on the retired list of the United States Army.

7. In holding that it was the ministerial duty of the defendant, Comptroller General of the United States, when the questions were presented formally for his decision in accordance with paragraph 6 of section 8 of the act of July 31, 1894, 28 Stat. 207, as amended by section 304 of the act of June 10, 1921, 42 Stat. 24 (U. S. C. 31: 74, par. 3), to decide that the plaintiff was placed on the retired enlisted men's list of the United States Army pursuant to statutory laws and/or to decide that the plaintiff was entitled to be paid retired pay in that status contrary to what the defendant, Comptroller General of the United States, theretofore already had found and decided in a formal written decision addressed to the disbursing officer who had presented the questions and who had applied for a decision, and, also, to the Chief of Finance, United States Army, who had forwarded such questions and application for decision, by indorsement.

8. In enjoining and commanding the defendant, Chief of Finance, to pay or cause to be paid retired pay to the plaintiff for the month of November, 1931, and subsequent months, after the defendant, Comptroller General of the United States, had rendered his decision of January 19, 1932, in accordance with paragraph 6 of section 8 of the act of July 31, 1894, 28 Stat. 207, as amended by section 304 of the act of June 10, 1921, 42 Stat. 24 (U. S. C. 31: 74, par. 3), holding that such payment was not authorized.

9. In not dismissing the plaintiff's bill of complaint for an injunction and discharging the rule to show cause on the motions to dismiss filed by the respective defendants.

10. In not overruling the plaintiff's motion to strike the answer of the defendant, Comptroller General of the United States, and for a decree pro confesso.

11. In not holding that the plaintiff has a plain, adequate, and complete remedy at law by suit in the United States Court of Claims under section 1, act of March 3, 1887, 24 Stat. 505, as amended by section 145, act of March 3, 1911, 36 Stat. 1136 (U. S. C. 28:250).

12. In not holding that the bill of complaint entirely fails to show that the plaintiff will suffer any irreparable injury if relief by injunction is denied.

13. In not holding that the reference of plaintiff's claim to the Court of Claims for a decision, with the plaintiff's consent, on February 15, 1932, which reference was pending before the Court of Claims when the bill of complaint for injunction was filed herein, precluded the Supreme Court of the District of Columbia from taking jurisdiction of the proceeding for injunction.

14. In not holding that section 304 of the act of June 10, 1921, 42 Stat. 24, precludes the Supreme Court of the District of Columbia from directing the Comptroller General to decide a question presented to him under paragraph 6 [fol. 28] of section 8 of the act of July 31, 1894, 28 Stat. 204, in a particular way.

Leo A. Rover, United States Attorney for the District of Columbia; John W. Fihelly, Asst. United States Attorney for the District of Columbia; R. L. Golzé, General Counsel, General Accounting Office; Harrell O. Hoagland, Principal Attorney, General Accounting Office, Attorneys for the Defendant, Comptroller General of the United States.

Messrs. Samuel T. Ansell, Burr Tracey Ansell, and George Wilmeth, Esquires, attorneys for the plaintiff:

Please take notice that we are this 18th day of November, 1932, filing the foregoing assignment of errors.

Leo A. Rover, United States Attorney for the District of Columbia; John W. Fihelly, Asst. United States Attorney for the District of Columbia; R. L. Golzé, General Counsel, General Accounting Office; Harrell O. Hoagland, Principal Attorney, General Accounting Office, Attorneys for the Defendant, Comptroller General of the United States.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ASSIGNMENT OF ERRORS ON BEHALF OF FREDERICK W. COLEMAN, AS CHIEF OF FINANCE, UNITED STATES ARMY—Filed November 19, 1932

* * * * * * *

Now comes the defendant, Frederick W. Coleman, as Chief of Finance, United States Army, by his attorneys, and assigns for errors that the court erred—

1. In overruling his motion to dismiss the bill of complaint for an injunction and to discharge the rule to show cause.

2. In granting the plaintiff's motion to strike the answer of the defendant to the bill of complaint and to the rule to show cause.

3. In taking jurisdiction to pass upon and decide the question of plaintiff's right to relief prayed for in the bill.

4. In enjoining and commanding the defendant, Chief of Finance, to pay or cause to be paid retired pay to the plaintiff for the month of November, 1931, and subsequent months, after the defendant, Comptroller General of the United States, had rendered his decision of January 19, 1932, in accordance with paragraph 6 of section 8 of the act of July 31, 1894, 28 Stat. 207, as amended by section 304 [fol. 29] of the act of June 10, 1921, 42 Stat. 24 (U. S. C. 31:74, par. 3), holding that such payment was not authorized.

5. In not dismissing the plaintiff's bill of complaint for an injunction and discharging the rule to show cause on the motions to dismiss filed by the respective defendants.

6. In not overruling the plaintiff's motion to strike the answers of the defendants and for a decree pro confesso.

Leo A. Rover, United States Attorney. John W. Fihelly, Assistant United States Attorney.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

DESIGNATION OF RECORD—Filed November 19, 1932

* * * * * * *

The clerk will please prepare a transcript of the record in the above entitled cause, on appeal to the Court of Appeals of the District of Columbia, and include therein the following:

1. Bill of complaint for injunction and the rule to show cause issued thereon April 27, 1932.

2. Separate motion of the defendant, J. Raymond McCarl, Comptroller General of the United States, to dismiss

the bill of complaint and to discharge the rule to show cause.

3. Separate motion of the defendant, Frederick W. Coleman, Chief of Finance, United States Army, to dismiss the bill of complaint and to discharge the rule to show cause.

4. Memorandum opinion of Justice Adkins of June 10, 1932, overruling the defendants' motions to dismiss.

5. Separate answer of the defendant, Comptroller General of the United States, to the bill of complaint and to the rule to show cause and Exhibit A thereto attached.

6. Separate answer of the defendant, Chief of Finance, filed June 17, 1932, to the bill of complaint and to the rule to show cause.

7. Plaintiff's motion to strike defendants' answers.

8. Memorandum of Justice Letts dated July 16, 1932, granting plaintiff's motion to strike the answers of the defendants.

9. Final decree for injunction entered by the court September 16, 1932.

10. Notation of appeal by the defendants.

11. Assignment of errors.

12. This designation of record.

Leo A. Rover, United States Attorney for the District of Columbia; John W. Fihelly, Asst. United States Attorney for the District of Columbia; R. L. Golzé, General Counsel, General Accounting Office; H. O. Hoagland, Principal Attorney, General Accounting Office, Attorneys for the Defendants.

[fol. 30] We acknowledge service of the foregoing designation of record and receipt of a copy thereof this 19th day of November, 1932.

Burr Tracy Ansell, Attorney for the Plaintiff.

Clerk's certificate to foregoing transcript omitted in printing.

Monday, May 8th, A. D. 1933.

* * * * * * *

No. 5871

J. RAYMOND MCCARL, as Comptroller General of the United States, and Frederick W. Coleman, as Chief of Finance, United States Army, Appellants,

vs.

SANTOS MIGUEL

The argument in the above entitled cause was commenced by Mr. H. O. Hoagland, attorney for the appellant Comptroller General. (Mr. Justice Robb not sitting.)

Tuesday, May 9th, A. D. 1933.

* * * * * * *

No. 5871

J. RAYMOND MCCARL, as Comptroller General of the United States and Frederick W. Coleman, as Chief of Finance, United States Army, Appellants,

vs.

SANTOS MIGUEL

The argument in the above entitled cause was continued by Mr. H. O. Hoagland, attorney for the appellant Comptroller General, and by Mr. S. T. Ansell, attorney for the appellee, and by Messrs. Archibald King and William A. Graham, as amicii curiæ on behalf of the Secretary of War, and was concluded by Mr. H. O. Hoagland, attorney for the appellant Comptroller General. Additional authorities may be filed by either side, if desired. (Mr. Justice Robb not sitting.)

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COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5871

J. RAYMOND MCCARL, as Comptroller General of the United States, and Frederick W. Coleman, as Chief of Finance, United States Army, Appellants,

v.

SANTOS MIGUEL, Appellee

Appeal from the Supreme Court of the District of Columbia

(Argued May 8 and 9, 1933. Decided June 26, 1933)

Leo A. Rover, John W. Fihelly, R. L. Golze, and Harrell O. Hoagland, all of Washington, D. C., for the Comptroller General, appellant.

Samuel T. Ansell, Burr Tracy Ansell, and George M. Wilmeth, all of Washington, D. C., for appellee.

William A. Graham and Archibald King, Judges Advocate, U. S. Army, for the Secretary of War as amici curiæ.

Before Martin, Chief Justice, and Van Orsdel, Hitz, and Groner, Associate Justices

GRONER, Associate Justice:

Appellee, after more than thirty years' service in the Philippine Scouts, was retired as master sergeant pursuant to Special Orders No. 207 of the War Department, dated September 3, 1931, as follows:

"35. Master Sergeant Santos Miguel, R-320883, Service Company, 45th Infantry (PS), will be placed on the retired list at Fort William McKinley, P. I., effective October 31, 1931, and will be sent to his home. The travel directed is necessary in the military service.

"By order of the Secretary of War.

"Douglas MacArthur, General, Chief of Staff."

Appellee claims that the retirement order was made by authority of the act of March 2, 1907, 34 Stat. 1217, providing:

"That when an enlisted man shall have served 30 years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, and that said allowances shall be as follows: * * *"

Appellee in due course after retirement submitted to an Army disbursing officer a voucher for his retired pay and allowances for the month of November 1931 in the amount of $50.81. The disbursing officer was in doubt whether the payment should be made, and submitted the question to the Comptroller General with a request for an advance opinion as to the legal authority for its payment. The Comptroller General decided that appellee was not entitled to receive retired pay as a soldier in the Army of the United States, and directed the disbursing officer not to pay the voucher. Appellee thereupon instituted proceedings in the court below to require the Comptroller General to return the voucher to the disbursing officer and likewise to compel the Chief of Finance of the Army to pay or cause the same to be duly paid. After the bill was filed in the court below and some preliminary motions disposed of, the Comptroller General answered the bill. Appellee moved to strike, and this motion was sustained and judgment entered for appellee.

The question we have to determine is whether a mandatory injunction should issue against the Comptroller General directing him to approve and allow credit for payments of retired pay and allowances to a member of the Philippine Scouts at the rate provided by Act of Congress to be paid to a retired enlisted man of the Army of the United States. The Comptroller General in his answer denied that there was any fund or appropriation by Congress for payment of retired pay to enlisted men in the Philippine Scouts. He also alleged as an affirmative defense that there was a deficiency of nearly $2,000,000 in the fund appropriated for the pay and allowances of the active forces of the United States Regular Army.

On behalf of appellee it is urged that the order of retirement made by authority of the Secretary of War is a determination of the question that appellee is an enlisted man in the Army of the United States who had served thirty

years in the Army and is entitled under the quoted retirement statute to the same proportion of pay as any other retired enlisted man of the Army. In these circumstances appellee insists that his status and compensation have been duly fixed and that an appropriation has been duly made by Congress to pay the same and that thus every fact necessary to entitled him to his retired pay being present, actual payment may not be withheld by any action on the part of the Comptroller General or the Chief of Finance of the Army.

Cases in which the extraordinary writ of mandamus or injunction was asked to require or compel specific action by an executive officer of the Government have been often before the courts for judicial consideration and determination. Some of them are Smith v. Jackson, 246 U. S. 388; Roberts, Treasurer, v. United States, 176 U. S. 221; Champion Co. v. Fisher, 227 U. S. 445; U. S. v. Lamont, 155 U. S. 303; Dunlap v. Black, 128 U. S. 40; Board of Commissioners, etc., v. Aspinwall, 65 U. S. 376; McCarl v. Cox, 8 F. (2d) 669; McCarl v. Pence 18 F. (2d) 809; United States v. Harsha, 56 Fed. 953; Hines v. Cavanagh, 39 F. (2d) 517.

In this case the grounds on which the Comptroller General based his opinion are set out in a letter to the disbursing officer in reply to the latter's request for an advance opinion as to the legality of the proposed payment. In this letter, filed as an exhibit with the answer, the Comptroller General places his refusal to approve the payment on various acts of Congress in relation to the organization of the Philippine Scouts. The first of these statutes is that of February 2, 1901, 27 Stat. 757. In section 36 thereof the President is authorized to enlist natives of the Philippine Islands for service in the Army, to be organized as scouts with such officers as he shall deem necessary for their proper control, or as troops or companies as authorized by the act for the Regular Army. The act limits the total number of enlisted men in "native organizations" to 12,000. The act also provides that the President shall appoint the commanding officers of the squadrons and battalions thus formed from officers in the Regular Army of the United States, and provides that the pay, rations, and clothing allowances to be authorized for the enlisted men shall be fixed by the Secretary of War, and shall not exceed those authorized for the Regular Army. If in the opinion of the Presi-

dent the natives of the Islands shall by their services and character show fitness for command, the President shall be authorized to appoint them first and second lieutenants and when so appointed they shall have the pay and allowances to be fixed by the Secretary of War not exceeding those of the corresponding grades of the Regular Army.

The second act referred to is the National Defense Act of June 3, 1916, 39 Stat. 181, in which the existing law in relation to the Philippine Scouts was ordered continued in force and effect, except that by section 26 it is provided that captains and lieutenants of Philippine Scouts who are citizens of the United States shall thereafter be entitled to retirement under the laws governing the retirement of enlisted men of the Regular Army, except that they shall be retired in the grade held by them at the date of retirement, and that officers of Philippine Scouts retired under the provisions of this section shall not form part of the limited retired list now authorized by law.

It will be noticed that these acts, while referring to the organization, etc., of the Philippine Scouts (section 26), are confined to officers thereof.

Next in point of reference is the act of June 4, 1920, 41 Stat. 775, where the provision (section 26) with relation to the retirement of officers of the Scouts was repealed, and it was provided:

"On July 1, 1920, all officers of the Philippine Scouts on the active list, who are citizens of the United States and are found qualified under such regulations as the President may prescribe, shall be recommissioned in some one of the branches provided for by this act, and those not so recommissioned shall continue to serve under their commissions as officers of the Philippine Scouts. No further appointments shall be made as officers of Philippine Scouts except of citizens of the Philippine Islands, who may be appointed in the grade of second lieutenant, under such regulations as the President may prescribe. Officers commissioned in the Philippine Scouts shall be subject to promotion, classification, and elimination, as hereinafter prescribed for officers of the Regular Army. Those now on the retired list shall hereafter receive the same pay as a retired second lieutenant of equal service. * * * Nothing in this act shall be construed to alter in any respect the present status *of enlisted men* of the Philippine Scouts."

A subsequent act of June 10, 1922, 42 Stat. 632, likewise conferred on officers and former officers of the Philippine Scouts the status of officers in the regular establishment, but this act, like its predecessor, provided that it should not be construed in any way as changing existing laws or regulations governing pay and allowances for the enlisted men of the Philippine Scouts.

The Comptroller General concludes his opinion as follows:

"It seems clear from this legislative history that in authorizing the enlistment in the Army of natives of the Philippine Islands to be organized as scouts and when deemed necessary 'as troops or companies as authorized * * * for the Regular Army' that it was not contemplated that any member of such organization of natives of the Philippine Islands should be entitled to retirement, either officers or enlisted men. By section 22 of the act of June 3, 1916, provision was made for placing on the retired list captains and lieutenants of the Philippine Scouts citizens of the United States under the laws governing the retirement of enlisted men of the Regular Army. This provision for the retirement of officers of the Philippine Scouts has been changed by subsequent legislation, but it has been specifically provided that nothing therein should alter in any respect the present status of enlisted men of the Philippine Scouts. No law has modified the status of enlisted men of the Philippine Scouts as fixed by the act of 1901."

We are of opinion that appellee's claim to retired pay cannot be adjudicated in this proceeding, and that his rights can only be determined in a proper suit or action instituted in the Court of Claims. The basis of this is the rule that mandamus or injunction should not issue in a case of doubtful inference from statutes of uncertain meaning, for in such circumstances the duty sought to be controlled is regarded as involving the character of judgment or discretion. Wilbur v. United States, 281 U. S. 206. The Comptroller General, when applied to by the disbursing paymaster of the Army, was required by law to decide the question of appellee's right to retired pay. The right was regarded as doubtful by the disbursing officer, and in order to protect himself against a disallowance by the accounting office if payment should ultimately be held not valid, he ap-

plied, in accordance with law, to the Comptroller General for an advance opinion. The opinion was given, and once given is binding on the executive branch of the Government. Skinner & Eddy Corp. v. McCarl, 275 U. S. 1. The decision of the Comptroller General made under these conditions, while conclusive so far as the executive branch of the Government is concerned; is not final in the sense that it is not subject to review in the courts, but the cases in which the courts have interfered by mandamus were cases in which there was no dispute that the petitioners were officers of the United States or creditors of the United States, and in either case that the accounting and disbursing officers had determined they were entitled to their pay or debt and that an appropriation was available in the hands of the defendant from which to make payment.

In such cases the courts are always justified in granting relief, as for instance where a statute fixes an officer's compensation, as in the case of Judge Jackson of the Panama Canal (Smith v. Jackson, supra) and appropriates money for its payment and there is no dispute as to the identity of the person petitioning and the office, nor any dispute as to the availability of the appropriation, the disbursing officer or the Comptroller General has no function to perform except the payment of the money, and upon refusal may be compelled to do so by mandamus. But where, in a case like this, there is in good faith a contest on the question whether petitioner is a retired soldier of the Army, or whether, even if he is, his right to pay is fixed by an appropriation with relation to enlisted men "in the Army, Navy, or Marine Corps", or where, as in this case is stated under oath by the Comptroller, there are no funds available, it is clear, we think, that neither mandamus nor injunction should issue. In every case which we know of in which there is a disputed question of fact itself essential to a determination of the case, or where there is a question of merits to be considered, courts have held that injunction or mandamus is not the proper remedy. Certainly there is on the face of the applicable statutes we have referred to serious doubt whether Congress has placed the enlisted personnel of the Philippine Scouts in the same class as enlisted men of the Regular Army, and if this is true, then obviously the right to mandamus is not "clear and indisputable" (Board of

Commissioners v. Aspinwall, supra), for admittedly there is no direct legislation on the subject.

Nor do we think the order of retirement directed by the Secretary of War is a conclusive finding of fact of the status of petitioner. So far as appears, it was a routine matter, but whether routine or not, it was effective only if authorized by law. Congress alone can make appellee a retired soldier of the Army of the United States. The decision of the Comptroller General, however, does not affect the status of petitioner so far as the retirement order is concerned, and that question need not be passed on. The Comptroller General's action affects merely his right to retired pay, and that depends upon whether Congress has provided the right to such retired pay and has made an appropriation accordingly. As to that the Comptroller General, in his capacity as head of the accounting office of the Government, has the right of determination, for it is unlawful for any sum to be paid out of the Treasury of the United States except according to law, and the duty of the Comptroller General is primarily to determine that question. We think it is a misconception, therefore, to say that because of the retirement order of the Secretary the question of appellee's status may not be inquired into, and we think in the circumstances we have shown, the Comptroller's decision was binding until reversed or set aside by a proper proceeding in a court having jurisdiction of the controversy and of the parties, and we do not think this is such a proceeding. Denby v. Berry, 263 U. S. 29; Lisle v. Lynch, 137 U. S. 280.

The decree of the lower court will be reversed and the cause remanded with instructions to dismiss the bill.

Reversed.

A true copy. Teste:

——— ———, Clerk Court of Appeals, D. C.

Monday, June 26th, A. D. 1933.

* * * * * * *

No. 5871, April Term, 1933

J. Raymond McCarl, as Comptroller General of the United States, and Frederickk W. Coleman, as Chief of Finance, United States Army, Appellants,

vs.

Santos Miguel

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be and the same is hereby reversed and that this cause be and the same is hereby remanded to the said Supreme Court with instruction to dismiss the bill.

Per Mr. Justice Groner, June 26, 1933.

Mr. Justice Robb took no part in the consideration or decision of this case.

In the Court of Appeals of the District of Columbia

No. 5871

J. Raymond McCarl, Comptroller General, and Frederick W. Coleman, Chief of Finance, U. S. Army, Appellants,

v.

Santos Miguel, Appellee

Appellee's Motion for Leave to Withdraw Motion to Extend Time for Filing Motion for Rehearing and for Stay of Mandate

Now comes the appellee in the cause herein, by his attorney, and asks leave of the Court to withdraw his motion

filed herein July 14, 1933, to extend the time for filing a motion for rehearing of this cause.

He now represents to the Court that it is his purpose to apply to the Supreme Court of the United States for a writ of certiorari for the review of the judgment herein entered on June 26, 1933.

Wherefore he moves the Court that issuance of the mandate in the cause herein be stayed pending the decision of the Supreme Court on his application for the said writ of certiorari as authorized by statute (28 U. S. C. §350).

Burr Tracy Ansell, Attorney for Appellee.

Service of copies of the foregoing motion acknowledged this 21st day of July, 1933.

Leo A. Rover, U. S. Attorney, for Appellant.

[Endorsed:] In the Court of Appeals of the District of Columbia. No. 5871. J. Raymond McCarl, Comptroller General, and Frederick W. Coleman, Chief of Finance, U. S. A., appellants, v. Santos Miguel, Appellee. Appellee's motion for leave to withdraw motion to extend time for filing motion for rehearing and for stay of mandate. Court of Appeals, District of Columbia. Filed Jul. 31, 1933. Henry W. Hodges, Clerk.

Tuesday, August 8th, A. D. 1933.

* * * * * * *

No. 5871

J. Raymond McCarl, Comptroller General, et al., Appellants,

vs.

Santos Miguel

On consideration of appellee's motion for leave to withdraw request for extension of time to ask for rehearing, and for stay of mandate, It is ordered that the motion to withdraw be and it hereby is granted, and it is further ordered that the mandate herein be and it hereby is stayed for 30 days from today under Rule 24.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5871

J. RAYMOND MCCARL, Comptroller General, and FREDERICK W. COLEMAN, Chief of Finance, U. S. Army, Appellants,

v.

SANTOS MIGUEL, Appellee

DESIGNATION OF RECORD

The Clerk in the preparation of the transcript of the record on petition for certiorari to the Supreme Court of the United States will include therein the following papers and proceedings, to wit:

1. The record.
2. Argument of the cause.
3. Opinion of the Court.
4. Judgment.
5. Motion to stay mandate.
6. Order staying mandate.
7. This designation.

Burr Tracy Ansell, Attorney for Appellee.

(Endorsed: No. 5871. J. Raymond McCarl, Comptroller General, et al., vs. Santos Miguel. Designation of Record. Court of Appeals, District of Columbia. Filed Aug. 29, 1933. Henry W. Hodges, Clerk.)

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 41, inclusive, constitute a true copy of the transcript of record and proceedings in the Court of Appeals, as designated by counsel, in the case of J. Raymond McCarl, as Comptroller General of the United States, and Frederick W. Coleman, as Chief of Finance, United States Army, appellants, vs.

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Santos Miguel, No. 5871, April Term, 1933, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 30th day of August, A. D. 1933.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, by Moncure Burke, Deputy Clerk. (Seal Court of Appeals, District of Columbia.)

[fol. 43] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 23, 1933

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,038. District of Columbia Court of Appeals. Term No. 435. Santos Miguel, petitioner, vs. J. Raymond McCarl, Comptroller General of the United States, and Frederick W. Coleman, Chief of Finance, United States Army. Petition for writ of certiorari and exhibit thereto. Filed September 6, 1933. No. 435, O. T., 1933.